Nos. 16-9514 & 16-9526

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DISH NETWORK, L.L.C.,
Petitioner – Cross/Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent – Cross/Petitioner.

PETITIONER'S REPLY BRIEF

PETITION FOR REVIEW OF DECISION AND
ORDER OF NATIONAL LABOR RELATIONS BOARD

Christian Antkowiak (PA ID 209231)
Brian D. Balonick (PA ID 89272)
Buchanan Ingersoll & Rooney P.C.
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
(412) 562-8800

Counsel for DISH Network L.L.C.

Oral Argument Requested
August 11, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. INTRODUCTION

In its Opening Brief in Chief,[1] DISH set forth the record facts with abundant supporting record citations[2] in an effort to accurately present the relevant facts and legal principles guiding this matter. In this Reply, DISH attempts not to simply repeat the facts and principles it has already set forth, but to correct the General Counsel's factual and legal misrepresentations, and to note where the General Counsel, like the Board before it, has failed to respond to DISH's arguments. The General Counsel's Response is deeply flawed because it largely reiterates the Administrative Law Judge's ("ALJ") erroneous and outcome-oriented opinion. The Court should not allow the Board to rubber-stamp the ALJ's opinion, but should require the Board to hear DISH's arguments (as opposed to the General Counsel's misinterpretations thereof); consider the record (as opposed to the ALJ's misrepresentations thereof); and apply the law (as opposed to the Board's misunderstanding thereof).

---

[1] DISH refers to its Opening Brief in Chief as "Opening Brief" or "Op. Br. __" followed by page number assigned by the Electronic Case Filing (ECF) system. DISH refers to the General Counsel's Response as "Response" or (GC Br. ___).

[2] DISH's Opening Brief cites the Record *as filed* according to the page numbers assigned by the Electronic Case Filing (ECF) System. The General Counsel, in apparent confusion, claims that "none of the Company's record citations … are (*sic*) remotely supportive of the proposition for which they are (*sic*) cited," the citation (GC Br. at ___). To avoid further confusion, DISH will continue to cite to ECF pages for all documents (including briefs) herein, but will also refer to the record as cited by the General Counsel, denoted by an asterisk. For example, Employer's Exhibit 15 is cited as: R. 705 (*698).

II. REPLY TO GENERAL COUNSEL'S STATEMENT OF "FACTS"

A. The General Counsel's Statement of "Facts" Misstates the Record.

The General Counsel's statement of the "Board's Findings of Facts" is not a faithful recitation of the record or relevant facts. This is largely because the General Counsel borrows from the ALJ's misrepresentations, which are not supported by substantial evidence. Where not borrowing from the ALJ's misrepresentations, the General Counsel attempts to backfill the record with "facts" which are neither referenced by the Board nor supported by the record. The following misstatements, which are by no means exhaustive, show how the General Counsel and ALJ have improperly manipulated the record:

1. Misstatement #1.

> "The [solicitation] policy is in effect at the Littleton Call Center and multiple other company locations nationwide. (R. *839; *753.)" GC Br. at 13.

a. Why it misstates the record.

The General Counsel cites to the ALJ's opinion R. 847 (*839)), which cites to a list of DISH's locations. R. 760 (*753). The list of DISH's locations is not evidence, let alone substantial evidence, of the locations where the non-solicitation policy applied. Moreover, the employee handbook containing the non-solicitation policy plainly states that "The Company reserves the right to deviate from the guidelines set forth in this Handbook or in other policies" and "[t]he position of the

Company in one situation does not bind or restrict the Company in other situations." R. 582 (*575). There is no testimony or document establishing where, when, or how DISH's non-solicitation policy applied outside of Littleton.

b. Why it matters.

The non-solicitation policy is lawful at Littleton because the only workplace that is identified in the record at that location is a sales floor. Accordingly, the Board's decision that the non-solicitation policy is unlawful hinges its *assumed* applicability to workplaces outside of Littleton. There is no evidence to support this assumption. To be sure, if the policy were ubiquitous as claimed, the Board would not have modified the ALJ's order "to clarify that the notice-posting remedy applies only to the Respondent's facilities in the United States where the employee handbook containing the unlawful solicitation has been or is in effect." R. 840 (*832).

2. Misstatement #2.

> "While the Company maintains a rule against 'excessive' use of silent hold, it does not enforce the rule (R. *841; *46, *100-101)." GC Br. at 15.

a. Why it misstates the record.

The rule cited by the General Counsel actually prohibits "placing the customer on *unnecessary* hold/mute." R. 549 (*542 at #18) (emphasis added). The General Counsel's language is taken from Rabb's (mis)interpretation of the rule as applying only to "excessive" silent hold. R. 51 (*46). It does not

accurately reflect the actual rule, rendering the claimed non-enforcement thereof meaningless. DISH enforced its rule against *unnecessary* hold prior to Rabb's termination. *See* R. 849 (*841) (noting L. Lewnard's discipline for "placing customers on unnecessary holds").

b. Why it matters.

This is a classic example of how, in this case, the General Counsel and Board have argued against their own misinterpretations of DISH's rules and reasoning instead of what DISH has actually asserted.

3. Misstatement #3.

> On February 18, Rabb's supervisor issued him a "final warning" for soliciting employees "during work time and in work areas." (R. *839; *69-70; *75). Rabb admitted to soliciting, but maintained he did so only during non-work time. (R. *839; *65-68). GC Br. at 18-19.

a. Why it misstates the record.

The warning explicitly states that "disciplinary action is *not being taken for discussing wages or terms and conditions of employment with coworkers*, rather for violating company policy." R. 576 (*569) (emphasis added). The excerpt omits the undisputed fact that the warning was issued when DISH received complaints from multiple employees about Rabb *distributing* post-it notes in work areas. Op. Br. at 19. The ALJ omitted this fact as well, and misrepresented the record by stating Rabb conceded he "might have solicited his coworkers on the work floor." R. 847 (*839) n.8. Rabb actually conceded much more than that. He

testified "I can recall a couple of times going and giving a co-worker a phone number, a name" while the coworker was at his or her workstation. R.71-72 (*66-67).

b. Why it matters.

This excerpt shows how the conclusions regarding Rabb's alleged "solicitation" are based on misrepresentations and manipulations of the record in lieu of substantial evidence.

4. Misstatement #4.

> On March 4, Rabb placed a customer on silent hold while the Company's software system generated an account number (R. *839; *99). During this time, he completed paperwork for the call, and used the restroom. (R. *839; *99, *155). GC Br. at 79.

a. Why it misstates the record.

Rabb did not place a customer on silent hold "while the Company's software system generated an account number." Rabb testified that he *told* the customer he was going to "go generate an account number and do some paperwork." R. 104 (*99). Then, *what he really did* was "put the customer on a silent hold, [and] went to the rest room." R. 104 (*99). The system was not generating an account number "during this time." In fact, Rabb admitted that an account number *had already been generated* when he put the caller on silent hold. R. 178 (*173).

b. Why it matters.

This is yet another example of the General Counsel and the ALJ's refusal to acknowledge Rabb's actual misconduct, which involved lying to a customer, and their insistence on substituting their own sanitized version of events for what really happened even per their own witness. This error also infects the General Counsel and ALJ's false comparison of Rabb's conduct to that of employees who "used silent hold." Because those comparisons are based on misrepresentations of Rabb's conduct, they are not supported by substantial evidence.

5. Misstatement #5.

> When Rabb returned from the restroom, Gass was waiting for him, was angry, and wanted to know why Rabb left his desk. (R. *840; *101, *172.) Rabb explained he had gone to the restroom, and that he frequently placed customers on hold for short periods of time. (R. *839; *99-100). He then completed the sale. (R. *840; *99-101, *172). GC Br. at 19-20.

a. Why it misstates the record.

First, Rabb's explanation that "he had gone to the restroom in the past" is irrelevant because DISH modified its rules just over a year before Rabb's termination with "non-negotiables" prohibiting silent hold abuse.[3] Second, Rabb's explanation does not address his abuse of silent hold or lying to a customer. Third,

[3] Notably, the General Counsel's the statement of the Board's "Facts" does not reference DISH's "non-negotiable" rules to curb silent hold abuse as of February 2013.

Rabb did not "complete the sale" after he was caught abusing silent hold. The sale was already complete. R. 178 (*173).

b. Why it matters.

Through this misstatement, the General Counsel again attempts to minimize Rabb's conduct, but fails to address a key fact in this case: that DISH included "improper use of hold/mute" was explicitly prohibited by DISH's "non-negotiables" as of February 2013. Accordingly, any attempt to compare Rabb's misconduct with conduct that is not specifically placed in time, fails as a matter of law. Moreover, if Gass "was angry" upon discovering Rabb's silent hold abuse, this should have indicated to a reasonable fact finder that Rabb's termination had nothing to do with his "protected conduct" and everything to do with his flagrant call avoidance.

6. Misstatement #6.

> "On March 7 [2014], the Company discharged Rabb based on the February 28 and March 4 [2014] incidents." When Rabb received the termination notification, he informed the Company again that placing customers on silent hold was a routine practice that was known to all supervisors and ISAs. GC Br. at 20.

a. Why it misstates the record.

The record is clear that in deciding to terminate Rabb, the Company also considered Rabb's *final warning* which he received in April 2013 for "milking a call" R. 357 (*351), as well as his rude reaction to Gass. R. 364-65 (*358-59).

Alarmingly, Rabb's *final warning* for call avoidance was inexplicably omitted from the record at all phases in these proceedings. Meanwhile, Rabb's "explanation" is false. He had just been warned for the same behavior, which was call avoidance; not simply "placing customers on silent hold". R. 365 (*359).

b. Why it matters.

The General Counsel and Board's demonstrated refusal to honestly or accurately review the factors contributing to Rabb's termination and precludes any finding that the Board's decision is based on substantial evidence.

III. REPLY TO THE GENERAL COUNSEL'S ARGUMENT

A. The General Counsel Cannot Justify the Board's Failure to Correctly Apply the Law or Consider the Evidence and Arguments Relating to Rabb's Warning for Distributing Notes to Employees.

The Board's incomplete analysis of DISH's non-solicitation policy violates Supreme Court precedent and DISH's right to be heard. The Supreme Court explained long ago that when regulating an employer's policies, "the NLRB's function [is] to strike the balance in all areas within its jurisdiction between conflicting legitimate interests in order to effectuate the national labor policy." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 484 (1978). Accordingly, when the Board finds a non-solicitation policy "presumptively unlawful," it must at least consider whether the presumption can be rebutted by "special circumstances" in a given case. *Id.* at 492-93.

1. The General Counsel cannot cure the Board's unlawful refusal to consider evidence of DISH's special circumstances.

The Board violated the Supreme Court's mandate and refused to consider DISH's interests in maintaining a non-solicitation policy at the Littleton call center on the grounds that the call center is not a sales floor with customers on site. R. 839 (*831) n.1. In refusing to consider DISH's arguments, the Board further failed to consider any evidence of the call center's special circumstances. *Id.* The General Counsel cannot cure this defect because, contrary to its revisionist argument (GC Br. at 29-30), "special circumstances" are not—and never have been—limited to specific sets of industries.

As the Supreme Court has observed, "even the formulation of the 'special circumstances' rule is stated in terms of the specific environment of an *industrial plant*, speaking of circumstances making a restriction on employee activity 'necessary in order to maintain ***production or discipline***.'" *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 517 (1978) (Powell, J., concurring) (citing *Republic Aviation Corp. v. NLRB*, 324 U. S. 793, 803-04 n.10 (1945)) (emphasis added). The focus has always been maintaining production or discipline; not the industry involved. *Id.* at 511.

If the General Counsel's argument were correct, and special circumstances could arise only from recognized industries, the rule would never have evolved from the industrial sector to the health care or retail sectors. *See NLRB v. Baptist*

Hosp., Inc., 442 U.S. 773, 781 (1979) (vacating a Board order which would have forced a hospital to allow solicitation in operating rooms). The Board and Courts could have turned a blind eye to the effects of unrestrained solicitation on hospitals and retail industries. Likewise, the Board and Court could have turned a blind eye to effects of unrestrained solicitation on employees in DISH's Littleton call center. But neither the Supreme Court nor common sense permit this. The Board cannot pick and choose among industries for which it will consider the special circumstances rule or, more generally, execute its duty to balance competing interests. *Baptist Hosp.*, 442 U.S. at 779.

In light of these established principles, the General Counsel's argument that "special circumstances" apply only to workplaces where customers are physically present is a non-starter. As if addressing this precise issue, the Supreme Court explained "even if this were the correct formulation—that the *Republic Aviation* presumption applies to retail establishments but is rebutted by proof of the presence of members of the public in areas where solicitation takes place—that test would be satisfied in all retail-establishment cases … . The result would be the same as if the presumption did not apply at all." *Beth Israel Hosp.*, 437 U.S. at 517 (Powell, J., concurring) (citing *Republic Aviation*, 324 U. S. 793).[4] Like the Supreme Court, the Board itself has rejected the premise that the presence of

[4] This point from Justice Powell's concurrence, which was joined by two other Justices, was not in conflict with or addressed by the majority's opinion.

customers controls the existence or non-existence of "special circumstances." Op. Br. at 31. Thus, the Board clearly erred by shutting the door on the possibility of special circumstances unless customers physically cross an employer's threshold.

2. The General Counsel has not explained why DISH's evidence of special circumstances should not be considered.

The Board's refusal to consider special circumstances is troubling given the *undisputed* evidence that was presented on this subject. DISH showed how the call center is a "crazy and chaotic" place, where approximately 1,000 sales agents work just feet apart and within earshot of each other. Op. Br. at 12. Sales agents deal directly with customers all day and may take breaks in the call center alongside other agents who are working. Op. Br. at 12. Unrestricted solicitation in the call center would interfere with, and distract working ISAs, and be audible to customers. These arguments were made to the ALJ and the Board, but never considered. R. 793 (*785) (exception 17). The General Counsel does not address this failure.

By failing to consider the record, the Board failed its duty to balance the employer's interests with its own. It applied a double standard where the value of modern communications extends only to employees engaged in concerted activity with each other, and to not employers engaged in business with customers. Op. Br. at 33. Finally, like the General Counsel, the Board has lost sight of the applicable

legal standard: that a non-solicitation policy covering "working time or working areas" is only *presumptively*—not *per se*—unlawful. When the Board refuses to consider an employer's attempt to rebut the presumption, it plainly errs.

3. The General Counsel fails to justify the Board's unsupported assumption that DISH's non-solicitation policy extends to non-working areas outside the Littleton call center.

The General Counsel's Response does not address the Board's cagy attempt to imply—through inapt parenthetical citations—that DISH's non-solicitation policy extends to work areas other than the sales floor. R. 839 (*831) n.1. As addressed in DISH's opening brief, and emphasized above, there is simply no evidence—let alone substantial evidence—that allows the Board to make this assumption. Op. Br. at 33-34; *supra* at Pt.II.A.1. The General Counsel cannot challenge this point.

The General Counsel claims the solicitation policy is *per se* unlawful "because it requires the Company to pre-approve all solicitation." GC Br. at 28. This claims fails for multiple reasons. First, the cases on which the General Counsel relies prohibit policies requiring pre-approval for solicitation "on an employee's free time *and* in nonwork areas." R. 847 (*839) *Brunswick Corp.*, 282 NLRB 794, 795 (1987) (emphasis added). DISH's policy, however, required pre-approval for solicitation "during work time or in work areas." Under DISH's policy, the employee would need pre-approval to solicit *either* during work time

(in work or non-work areas) *or* in work areas (during free or work time). It does not require pre-approval when an employee is on free time *and* in nonwork areas. Second, the General Counsel does not cite a single opinion extending the Board's "pre-approval" ban to cases where special circumstances allow an employer to ban solicitation. Because the Board failed to consider special circumstances, the General Counsel cannot hang its hat on a "pre-approval" requirement.

B. The General Counsel Cannot Show How the Board's "Rejection" of Rabb's Actual Misconduct (i.e., Distributing Notes in Working Areas) Was Legally Sound or Supported by Substantial Evidence.

Because the Board violated DISH's right to be heard on its special circumstances argument, the Board's decision that DISH unlawfully warned Rabb under the policy is infirm and unenforceable. The General Counsel's attempts to justify this decision are, therefore, futile and should not be considered. Moreover, even if these attempts were considered, they would fail for the following separate and independent reasons.

1. The Board failed to apply the correct standard, or *any* standard, when deciding to "reject" Rabb's distribution as the reason for his warning.

The Board's "reject[ion]" of the fact that Rabb was warned for distributing post-it notes strays from the applicable legal standard and is not supported by substantial evidence. The Board cannot simply "call it like it sees it" when deciding an employer lawfully disciplined an employee for misconduct occurring

in the course of protected activity. Instead, it must apply the appropriate legal standard. Before "reject[ing]" the record of Rabb's distribution, the Board was obligated to first determine whether DISH had an honest belief that Rabb engaged in misconduct and then whether the General Counsel proved that the misconduct did not occur. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

There is no merit to the General Counsel's attempt to excuse the Board's failure to apply the correct standard. GC Br. at 34 (citing 29 U.S.C. § 160(e). As the General Counsel states, *Burnup* applies where, in the course of otherwise protected activity, employee is disciplined based on the employer's good-faith, albeit mistaken, belief that the employee had engaged in misconduct. GC Br. at 34-35. Here, the Board rejected DISH's stated reason for that warning (*i.e.*, handing notes to employees at workstations to the point of complaint). R. 839 (*831) n.1. Thus, by the General Counsel's own analysis, *Burnup* applies. To be sure, the General Counsel makes no suggestion as to what other standard should apply when an employee is disciplined for misconduct during otherwise protected activity and the existence of misconduct is later challenged.

The General Counsel's complaint that DISH should have raised its *Burnup* argument earlier makes no sense because the issue did not arise until the Board "rejected" Rabb's distribution of post-it notes. Unlike the Board, the ALJ did not affirmatively "reject" the fact that Rabb was disciplined for distributing post-it

notes. Instead, the ALJ omitted the fact from his analysis. R. 851 (*843). The ALJ covered-up Rabb's clear admission that he approached employees at their workstations to distribute information (*supra*, at Pt.II.A.3). R. 847 (*839) n.8. He further failed to mention that *multiple* employees felt compelled to complain about Rabb's conduct. Ignoring these facts, the ALJ claimed that "Dish made no showing that [Rabb]'s activities interfered with his own work, the work of others, or Call Center operations." R. 851 (*843).

DISH specifically objected to the ALJ's false statement concerning Rabb's misconduct and its effect on other employees. R. 793 (*785) (exceptions 18-19). Having reviewed those exceptions, the Board could either affirm the false statements (in which case the finding would not be supported by substantial evidence), reject the findings, or remand for clarification. Instead, after nine months, the Board summarily "rejected" the fact that DISH warned Rabb for distributing post-it notes. That rejection violates *Burnup* and *compounds* the ALJ's errors. It does not merely *repeat* an error that could have been noted earlier.

2. The Board's decision that Rabb was warned for solicitation is not supported by *post-hoc* manipulations of the record.

The Board's rejection of Rabb's distribution fails for a separate and independent reason in that it is not based on substantial evidence. This deficiency is underscored by the General Counsel's Response, which attempts to cite "facts" that the Board did not consider, most notably the spliced quotations from Evan's

email GC Br. at 33-34 (citing R. 622 (*615). If the Board's decision were supported by substantial evidence, the General Counsel would have no need to bolster it with "evidence" that is referenced only generally by the ALJ's and not mentioned by the Board.

Even if the General Counsel's bolstering were proper, which it is not, it would fail to support the Board's findings. The General Counsel makes much of the following sentence from one of Evans' emails, but it *leaves out* the italicized language: "*We were informed by 2 agents, Laura Hendricks and Jack Patterson that David* Rabb was soliciting for people to call his attorney to join his 'case' he is building against DISH about the QA chargeback process." *Compare* GC Br. at 34 *with* R. 622 (*615). The General Counsel's omission is critical because Laura Hendricks and Jack Patterson are the employees *who complained about receiving sticky notes*. R. 369-373 (*363-367).[5] A neutral fact finder could not find that the lay-author of this quotation, when viewed in its entirety, intended "soliciting" as separate term of art to be distinguished from the "distributing" about which Hendricks and Patterson had just complained. Certainly, the General Counsel has not met *its* burden to prove otherwise.

The General Counsel mistakenly relies on a similar manipulation of the record when it cites the *Board*'s manipulation of Rabb's warning. (GC Br. at 33).

[5] None of these facts was disputed or addressed by the ALJ.

The Board, which faults DISH for not referencing "distribution" as a term of art in Rabb's warning, fails to address the language in the warning that explicitly states the warning was *not issued for* "*discussing wages* or terms and conditions of employment." R. 576 (*569).† The Board's selective view of Rabb's warning, at best, suggests a lack of even-handedness that taints its opinion. When the Board manipulates the record, it does not rely on substantial evidence.

C. The General Counsel Fails to Justify the Board's Refusal to Properly Apply Each Phase of Its *Wright Line* Analysis to Rabb's Termination.

The Board's decision that Rabb was unlawfully discharged despite engaging in repeated call avoidance is based, in part, on its defective "solicitation" analysis. As such, the Board's unlawful discharge finding is infected with legal error and not factually supported. In addition to this error, the Board's analysis suffers from multiple other fundamental errors which DISH identified at each phase the analysis under *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).[6]

† Meanwhile, the ALJ references this language in his statement of facts, but inexplicably omits it from his analysis. R. 847 (*839), 851 (*843).

[6] For ease of reference, the Board's errors at the first ("*prima facie*") phase of analysis were: (1) the Board failed to require, much less establish, a causal link between any "animus" or unlawful motivation and Rabb's termination; (2) the Board failed to substantiate any findings of "animus" from the record; and (3) the Board failed to consider the entire record at the first ("*prima facie*") phase of analysis (*id.* at Op. Br. at 36-39). The Board's errors at the second ("pretext") phase of analysis were: (1) the Board double counted its finding of discriminatory animus at a phase where animus is not

Like the Board, the General Counsel fails to address DISH's arguments. Instead of analyzing the evidence and standards at each phase of the *Wright Line* test, the General Counsel conflates its analysis into one "motivating factor" test. It then attempts to consolidate DISH's arguments into three ill-fitting categories which cover only some of DISH's points. GC Br. at 46. This approach not only misstates DISH's arguments; it precludes the General Counsel from addressing them at the appropriate analytical phase or in a way that makes sense.

1. The General Counsel fails to address the Board's failure to require causation, substantiate any findings of animus, or consider the entire record at the first phase of its *Wright Line* analysis.

a. The Board failed to require causation and provided no analysis to cure its failure.

DISH's first argument that the Board failed to explain *how* unlawful animus motivated *Rabb's termination* centers on causation, and the Board's refusal to require or analyze this element of Rabb's claim. The General Counsel and the Board appear to believe it is enough to cite to "animus"—even if there is no evidence the animus *contributed* to the employer's decision. This is simply incorrect. *See NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir.

---

relevant to the analysis; (2) the Board misrepresented the record and violated this Court's rulings regarding similarly-situated when it cherry-picked comparators and applied its own subjective (and irrational) standards of similarly-situated misconduct; (3) the Board violated Supreme Court precedent by supplanting DISH's business judgment with its own, thus using its authority as a pretext for interfering in DISH's personnel decisions. Op. Br. at 40-47.

2003) (emphasizing that "anti-union animus [must have] *actually contributed* to the discharge decision") (emphasis in original).

In an attempt to avoid causation, the General Counsel mistakenly cites to the Seventh Circuit's decision in *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015). That case does not stand for the proposition that the Board can refuse to analyze causation. Much to the contrary, the Board's incorrect iteration of the *Wright Line* standard in that case was saved only by explicit findings (including pretext) in the text of its decision which are not present here. *Id.* at 776.

In *AutoNation*, the employer suspended its employee three days after learning about his union activity and a suspended license. *Id.* at 769-70. While the employee was suspended, the employer told the employee that "a continuation of current employment … will not be made at this time." *Id.* at 770. The employee, believing his employment had been terminated, applied for unemployment benefits, and the employer fired him "job abandonment". *Id.* The Board found that while the suspension was lawful, the termination was not. *Id.* at 771. In doing so, it explicitly found that the termination for job abandonment was pretextual. *Id.* at 775; *AutoNation, Inc.*, 360 NLRB No. 141, slip op. at 8 (2014).

In affirming the Board, the Seventh Circuit reviewed a footnote in the Board's decision wherein the Board need not find "some additional, undefined 'nexus' between the employee's protected activity and the adverse employment

action." The court found the footnote "regrettable," but reasoned that "[w]hat the Board was saying … was that there was no need to prove additional *animus* beyond whatever animus lay behind the contested action." *Id.* at 775-76 (emphasis added). The court explained that the Board's position could make sense if, for example, "an employer took the position it would fire all union organizers, and then it fired Union Organizer A." *Id.* at 775. In that kind of case, there would be no need to show [the employer] had an "extra grudge" against the organizer related to union activity because … "there is a clear nexus between the employer's anti-union animus and the particular action it took." *Id.* Similarly, the court found in the case at hand that the employer threatened to demote employees who engaged in union activities, terminated the employee, and then offered a pretextual reason for the termination (i.e., job abandonment after the employee was effectively terminated). It concluded that despite the "imprecis[e]" language in Board's footnote, the body of the Board's decision appropriately considered the record. *Id.* at 775-76.

In *this case*, the problem with the Board's footnote is not about "additional animus"; it is about causation (i.e., whether the animus contributed to the adverse action). Unlike *AutoNation*, there is no body of text to accompany the Board's footnote. Unlike *AutoNation*, there is no evidence of a corporate directive to discipline employees involved in protected conduct or finding of pretext that might

cure the Board's footnote, which uses its own undefined standard[7] instead of causation. Accordingly, unlike *AutoNation*, it is impossible to divine "what the Board was saying," decipher whether it ultimately considered causation, or say the imprecise language (and refusal to apply the correct standard) did not make a difference.

b. The Board's "animus" findings are not supported by the record because they are either tainted by legal error or have no connection to Rabb's discharge.

In addition to its fundamental legal deficiencies, the Board's analysis is not supported by the record. The Board claims it relied on "the evidence of animus cited by the judge" and DISH's "unlawful discipline of Rabb." R. 839 (*831) n.1. The "unlawful discipline" for solicitation, however, suffers from the Board's failure to consider special circumstances. It also is irrelevant to a *Wright Line* analysis because, as an application of a content-neutral non-solicitation policy, it does not demonstrate unlawful *intent*. Op. Br. at 37 (citing *Burnup*, 379 U.S. at 25). The General Counsel indirectly challenges this argument by noting that evidence of past unfair labor practice charges *may* demonstrate unlawful intent later. (GC Br. at 39). While that is true as a general principle, unfair labor practices that *do not require intent in the first instance*, should not be foisted as evidence of intent later.

[7] The fact that the same language can have difference meanings in *AutoNation* (animus) and here (causation) further shows that the Board's standard is undefined. Moreover, the Board's "cut and pasting" of the footnote from *AutoNation* without application to the context of this case further emphasizes the lack of attention to this case.

To be sure, the cases the General Counsel cites rely on *intent-based* unfair labor practices, not content-neutral solicitation policies, as evidence of animus. GC Br. at 39. *See Presbyterian/St. Luke's Med. Ctr. v. NLRB*, 723 F.2d 1468, 1476-789 (10th Cir. 1983) (charging party's evidence of animus included "demonstrated hostility to the union" and clear record of violating act *with respect to her*" and not simply maintaining policies) (emphasis added), *NLRB v. Interstate Builders, Inc*., 351 F.3d 1020, 1034 (10th Cir. 2003) (unlawful interrogation of and discrimination against union supporters); *MJ Metal Products, Inc. v. NLRB*, 267 F.3d 1059, 1066 (10th Cir. 2001) (retaliatory conduct); *Austal USA, LLC*, 356 NLRB 363, 364 (2010) (unlawful interrogation, threats, and specific restrictions on "discussion of the Union"). The Board erred in relying on DISH's content-neutral non-solicitation policy as evidence of animus.

The only other animus "cited by the judge" is Rabb's DOL complaint. As DISH has already noted, however, the DOL complaint was filed three months before Rabb's termination. Op. Br. at 38; R. 68 (*63). The General Counsel does not address this temporal gap. Instead, it relies on the ALJ's fiction of "escalated protected activity." GC Br. at 47. This fiction, however, was never defined, rejected by Member Miscimarra, and not clearly relied on by the Board. R. 843 (*835) n.10. It is also analytically flawed in that it necessarily prioritizes some

types of protected conduct over others. The General Counsel does not address these issues in its Response. (GC Br. at 38).

c. The General Counsel's improper attempt to backfill the record only underscores the Board's inadequate analysis.

The General Counsel does not address DISH's final argument that the Board failed to consider the entire record at the *prima facie* phase. While the General Counsel goes to great lengths to backfill the record, this approach is improper. "Unlike a district court's decision, that of an administrative agency cannot be sustained on a ground the agency did not consider the agency's decision must stand or fall upon its reasoning." *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 313 (D.C. Cir. 2006) (citations omitted). "Post hoc rationalizations by agency counsel will not suffice." *Id.* (citations and brackets omitted).

Despite this well-settled law, the General Counsel now pretends that the Board found DISH's reasons for terminating Rabb to be pretextual. This argument is frivolous and easily dismissed because there is no such finding in either the Board or the ALJ's opinion. The Board does not use the word "pretext" and the ALJ uses it only once in describing the *standard* at the second phase of the *Wright Line* analysis. As the ALJ explained, a reason for termination is a pretext if the reason is "either false or not in fact relied upon." R. 851 (*843) (citing *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007)). The ALJ did not, and could not, conclude that any (let alone all) of the reasons for Rabb's

termination were false. Nor did the ALJ conclude that the reasons were not relied upon. In fact, the ALJ never accurately recited DISH's reasons for terminating Rabb in the first place. Op. Br. 27-28, 41-42; *supra* at Pt.II.A.3-6. Instead, he found that DISH was motivated by animus despite any or all of Rabb's misconduct, which is a finding that is fundamentally different than pretext.

Even if the General Counsel were permitted to inject findings into the Board's decision that were never made, it would need to demonstrate how these findings were based on substantial evidence. The General Counsel fails to do that with respect to its post-hoc pretext argument. It cites to the ALJ's botched comparator analysis, improper "business" judgment, and supposed credibility determinations. It does not cite to any evidence or any finding that DISH's stated reasons for Rabb's termination were false. The General Counsel never showed that Rabb *did not engage* in call avoidance or that DISH did not terminate Rabb (at least in part) for call avoidance. As such, it could not have met the standards for *pretext*, and there is no indication in the record that either the ALJ or the Board believed it did.

2. The General Counsel fails to address the Board's double counting of animus, double standards for "comparators", and disregard of DISH's business reasons at the second phase of its *Wright Line* analysis.

a. The General Counsel does not address DISH's argument that the Board improperly double-counted animus.

At the second phase of analysis, DISH argued that the ALJ and Board erred by double counting DISH's alleged "animus" at a phase where animus is supposed to be stripped from the analysis. The General Counsel recasts this argument as "in the Company's view, the Board 'double counted' pretext in its analysis." (GC Br. at 47). That is not the argument DISH or Member Miscimarra made, nor could it be, as there was never a finding of pretext. The Board's error is that it double counted *animus*. Double counting *animus* is a critical error because it prevents the Board from analyzing, as it must, whether DISH would have made the same decision in the absence of animus. Having missed this point, the General Counsel has no answer for it.

b. The General Counsel's "comparator" argument simply repeats the ALJ's misrepresentations of the record and misguided analysis.

The General Counsel's only proper argument at the pretext phase is that Rabb was allegedly treated worse than similarly-situated comparators. This argument, however, merely echoes the ALJ's opinion which misrepresents the record violates this Court's precedent. Op. Br. at 41-44. Instead of attempting to explain how the ALJ did not misrepresent DISH's stated reason for terminating

Rabb (i.e., call avoidance through abusing silent hold), the General Counsel simply repeats the ALJ's misrepresentations (e.g., Rabb was terminated for his "use of silent hold). (GC Br. at 42; R. at 789-91 (*781-83) (exceptions 6, 8-9)).

The failure to accurately state Rabb's misconduct infects the General Counsel and ALJ's comparator analysis. For example, the General Counsel and ALJ claim that other employees who engaged in *call avoidance* cannot be similar to Rabb unless they avoided their calls by abusing silent hold. This is an absurd argument. The General Counsel and Board cannot dictate what DISH may consider to be call avoidance, such as remaining on the line without a customer. In DISH's view, call avoidance through silent hold abuse at the end of call, when there is no reason to make a customer wait, is similar, if not worse, than call avoidance through remaining on the line at the end of a call without a customer. As the General Counsel admits, DISH disciplined employees who engaged in call avoidance by staying on the line. Neither the General Counsel nor the Board have attempted to explain why disciplining employees who engage in call avoidance by abusing silent hold should be treated any differently.

The General Counsel provides no answer to the other distortions of the record exposed in DISH's brief and the Board's failures to follow this Court's precedents with respect to similarly-situated comparators. Op. Br. at 43. Instead, the General Counsel perpetuates the Board's double standard: When reviewing

who DISH disciplined for similar conduct (i.e., call avoidance) the General Counsel and the ALJ apply a *narrow* standard (i.e., all call avoidance must be limited to silent hold abuse). However, when reviewing who DISH did not discipline, the General Counsel and ALJ applies a *broad* standard (i.e., call avoidance must include Break AUX usage). This "heads we win, tails you lose" tactic is fundamentally unfair and should not be countenanced by the Court.

c. The General Counsel and, apparently the Board, misunderstand the purpose and meaning of the rule barring their attempts to supplant employers' business judgment with their own.

Finally, as displayed by the botched analyses and double standards above, the General Counsel and ALJ erred by acting as a super-personnel department. The most egregious example of this occurs in the passage, relied upon by the General Counsel, where the ALJ surmised that if DISH were truly interested in curbing call avoidance, it should punish BREAK AUX overages in the same manner. Op. Br. at 44-45. For reasons already explained and not addressed by the General Counsel, this reasoning is improper and defective. I*d*. The General Counsel and ALJ cannot *presume* that call avoidance occurs when, for example, an employee exceeds Break AUX due to an accommodation under the ADA, or is sidetracked on the way back from lunch, or any other number of reasons that, unlike silent hold, DISH can track. Op. Br. at 45.

Contrary to the General Counsel's complaints, the prohibition against second-guessing employers' business judgment does not "require [the Board] to accept [DISH's] explanation for discharging Rabb without question." (GC Br. at 49). The ALJ was not required to accept DISH's explanation for discharging Rabb without question. He was required to accept DISH's business judgment as it relates to determining what constitutes call avoidance; treating silent hold differently than Break AUX; implementing restrictions on silent hold in 2013 (before Rabb's discipline); and evaluating the seriousness of silent hold abuse involving dishonesty to customers, repeated misconduct and a flippant lack of remorse, among other things.[8] The ALJ was not empowered to declare what constitutes call avoidance, direct DISH to discipline Break AUX overages, disregard DISH's 2013 rules, and dismiss other elements of Rabb's misconduct which are required to conduct a lawful comparator analysis. In other words, the ALJ was required to test DISH's explanation for fidelity with DISH's business parameters—not his own.

[8] The General Counsel claims DISH never asserted that Rabb's rudeness or insubordination were factors in his termination. These reasons are explicitly cited in the record (R. 364-365) (listing reasons for Rabb's termination including "*the way he responded and reacted*"). DISH also presented them to the ALJ, after which the General Counsel mocked DISH's view that Rabb's conduct was "insubordinate." (R. 803 (*795)). It is hard to understand how, after this, the General Counsel can claim these arguments were never raised.

IV. CONCLUSION

For any and all of the foregoing reasons, as well as the reasons articulated in its Opening Brief and Exceptions, DISH respectfully requests that its Petition for Review be Granted and enforcement of the Board's order be Denied.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28.1(e)(3) and 32(a)(7)(B), Petitioner/Cross-Respondent DISH Network, L.L.C. hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6811 words and 606 lines, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Rule 32(b); the typeface requirements of Fed. R. App. P. 32(a)(5) and Local Rule 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using 14-point font (and 13-point font in charts, footnotes and block quotes) in Times New Roman type style.

CERTIFICATIONS

We further certify that the hard copies filed with the court are exact copies of the version submitted electrically.

We also certify that this submission has been scanned for and is free of viruses.

/s/Brian D. Balonick
Brian D. Balonick

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2016, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Linda Dreeben, NLRB (appellatecourt@nlrb.gov)
David Hunter Miller (dmiller@sawayalaw.com)
Paula S. Sawyer (paula.sawyer@nlrb.gov)

/s/Brian D. Balonick
Brian D. Balonick